



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2005

Ms. Angela S. Gordon
Messer Law Firm
6947 Main Street
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OR2005-00497

Dear Ms. Gordon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217036.

The City of Lavon Police Department (the "department"), which you represent, received a request for copies of all documents contained in the personnel files of two named police officers. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you failed to assert section 552.102 of the Government Code within the ten business day period mandated by section 552.301(a) of the Government Code. Because section 552.102 was not timely raised, the information subject to this exception is presumed public. Gov't Code § 552.302. In order to overcome this presumption, the department must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or where third party interests are at stake. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Section 552.102 is considered a compelling reason to withhold information, and therefore we will consider its applicability to the submitted information.

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under this test. For example, information about public employees’ job performance or the reasons for their dismissal, demotion, promotion or resignation is not excepted from public disclosure. Open Records Decision Nos. 444 at 5-6 (1986), 405 at 2-3 (1983). After reviewing your arguments and the submitted information, we do not find that common law privacy protects the majority of this information. We do note, however, that the submitted documents contain personal financial information relating to the named officers. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common law privacy. See Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the personal financial information that must be withheld by the department under section 552.101 of the Government Code in conjunction with common law privacy.

Section 552.101 of the Government Code and common law privacy also protect an individual’s criminal history compilation. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. See *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the

criminal history information that must be withheld under common law privacy as encompassed by section 552.101 of the Government Code. *See id.*

Section 552.101 of the Government Code also encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, you must withhold the CHRI we have marked from the requestor.

Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. Upon review, we find section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the department must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted L-2 Declarations of Medical Condition and L-3 Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") are confidential under section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the department must withhold the submitted declarations, which we have marked, under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 1703.306 of the Occupations Code prohibits the public disclosure of the results of polygraph examinations. We have marked the portion of the submitted information that must be withheld under section 1703.306 of the Occupations Code in conjunction with section 552.101 of the Government Code.

The submitted documents also contain a medical record, access to which is governed by the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the document subject to the MPA.

The department asserts that much of the information in the submitted personnel files is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision 615 at 5-6. The department relies on Open Records Decision Nos. 600 (1992) and 354 (1982) in arguing that employee evaluations are excepted under section 552.111. These were overruled, however, by Open Records Decision No. 615. The information that you have marked as excepted under this section consists entirely of administrative and personnel matters and does not consist of advice, recommendations, opinions or other material reflecting the policymaking processes of the department. Therefore, you may not withhold any of the submitted information under section 552.111 of the Government Code.

You assert that the named officers' personal information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). You do not indicate that the officers at issue in the submitted information are currently licensed peace officers. If the officers at issue are currently licensed peace officers, the department must withhold the information we have marked under section 552.117(a)(2) and the previous determination set forth in Open Records Decision No. 670 (2001). If the individuals at issue are not currently licensed peace officers, the department must withhold the home address, home telephone number, social security number, and the family member information of the named individuals if they are current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Gov't Code § 552.117(a)(1). The department may not withhold the information we have marked under section 552.117(a)(1) if the employees did not make a timely election to keep the information confidential.

We also note that a portion of the submitted documents contains information concerning employees of another law enforcement agency, which may be excepted under section 552.1175 if the employees are peace officers. Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). We have marked the information that we believe pertains to employees of another police department in the submitted documents. If the department determines that the employees are officers who elect in accordance with section 552.1175(2) to keep the marked information confidential, the department must withhold the information pursuant to section 552.1175 of the Government Code.

A social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number,

you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

You seek to withhold the photographs of the named individuals pursuant to section 552.119 of the Government Code, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the individuals. We therefore determine that the department may not withhold the photographs at issue pursuant to section 552.119 of the Government Code.

Section 552.130 of the Government Code excepts from public disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the information that must be withheld from the public under section 552.130.

In summary, the department must withhold the following information: (1) the personal financial information and criminal history information we have marked as excepted under section 552.101 of the Government Code in conjunction with common law privacy, (2) the criminal history information that we have marked as confidential under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, (3) the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code, (4) the submitted L-2 and L-3 declarations, which we have marked, under section 552.101 in conjunction with section 1701.306 of the Occupations Code, (5) the polygraph examination information that we have marked under section 1703.306 of the Occupations Code in conjunction with section 552.101 of the Government Code, and (6) the motor vehicle information we have marked under section 552.130 of the Government Code. The department may only release the submitted medical record as provided under the MPA. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code, if the named individuals are currently licensed peace officers as defined in article 2.12 of the Code of Criminal Procedure. If they are not currently licensed police officers, the information we have marked as excepted under section 552.117(a)(2) must be withheld under section 552.117(a)(1) if the individuals made a timely election to withhold that information under section 552.024 of the Government Code. We have marked information that may involve the personal information of officers of another agency. If the department receives notice from those officers in accordance with section 552.1175(2) that the officers choose to keep the marked information confidential, the department must withhold the information pursuant to section 552.1175 of the Government Code. Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

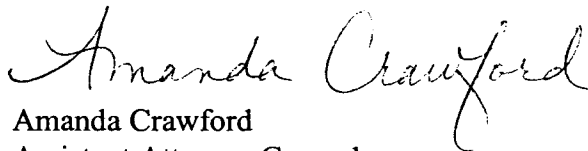
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 217036

Enc. Submitted documents

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